

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 211/09
5163576**

BETWEEN ZEAL 320 LIMITED
 Applicant

AND ENGINEERING PRINTING AND
 MANUFACTURING UNION
 INCORPORATED
 Respondent

Member of Authority: Leon Robinson

Representatives: Andrew Caisley and Rachel Larmer, Counsel for Applicant
 Greg Lloyd, Counsel for Respondent

Investigation Meeting: 25 June 2009

Determination: 26 June 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant company Zeal 320 Limited (formerly Freedom Air Limited) (“Zeal”) makes application to the Authority for a reference to facilitation. It relies on the grounds at sections 50C(1)(b) and 50C(1)(c) of the *Employment Relations Act 2000* (“the Act”). The respondent Engineering Printing and Manufacturing Union Incorporated (“the Union”) opposes the application because it says the statutory tests are not met. It further says the application is an abuse of process and that the parties continue to bargain and make progress.

[2] I granted urgency to this application. In the circumstances, I did not consider further mediation, in addition to the extensive mediation assistance already undertaken, would contribute constructively.

[3] I have heard evidence from Air New Zealand Limited's ("Air NZ") Mr Glen Sowry (General Manager Tasman Pacific Airline) ("Mr Sowry"), Union National Secretary Mr Andrew Little ("Mr Little"), Union national industry organiser for aviation sector Mr Strachan Crang ("Mr Crang"), and the Union's director of organising Mr Bill Newson.

The facts

[4] Zeal is contracted to provide cabin crew services to Air NZ.

[5] Zeal's employees work as cabin crew on Air NZ's A320 aircraft, which operate on trans-Tasman and Pacific routes. The work performed is in an essential industry.

[6] About 240 of Zeal's employees are members of the Union.

[7] Zeal and the Union are not parties to a current or expired collective employment covering the relevant work.

[8] The Union's cabin crew members were almost all previously members of the Flight Attendants and Related Services Association ("FARSA"). They resigned from FARSA to become members of the Union. They have terms and conditions of employment based on the expired *Freedom Air Limited and FARSA collective agreement*.

Bargaining negotiations

[9] The Union initiated bargaining for a collective employment agreement with Zeal on 11 August 2008. The parties met to negotiate a bargaining process agreement from 22 August 2008 to 31 October 2008 on which date they signed a bargaining process agreement. They have been engaged in collective bargaining since then.

[10] On 31 October 2008, the Union tabled 117 claims. It tabled a further 12 claims on 25 November 2008.

[11] From 11 November 2008 until 10 December 2008 the parties met to progress negotiations on eight separate occasions. The sessions generally started at approximately 10.00am and ended at around 5.00pm.

[12] The claims that remain on the bargaining table relate to base salaries, term, allowances, sign on payments, KPI programme, hours of work working party, union rights, health and safety, definitions, time off at home base, disrupted duties, days off duty, all night duties, rest periods, accommodation, visa and passport provisions, annual leave provisions, employment protection provisions, part-time employees, ratification terms, and on settlement terms.

[13] On 28 January 2009 Zeal tabled a settlement offer.

[14] On 29 January 2009 the Union quantified its monetary claims following receipt of the settlement offer by Zeal.

[15] On 4 March 2009 the Union's bargaining team advised Zeal that the settlement offer had been rejected by the Union's members.

Mediation

[16] Since the initiation of bargaining on 11 August 2008, the parties have spent 30 days in negotiations. 16 of these days involved a mediator and so I refer to those sessions as mediation. I find that Zeal insisted that Mr Little and/or a mediator attend those sessions because "there clearly was tension" in the discussions. This schedule shows the dates and type of meetings between the parties:-

Date	Type of Meeting
7 October 2008	Bargaining
14 October 2008	Bargaining
31 October 2008	Bargaining
11 November 2008	Bargaining
12 November 2008	Bargaining
20 November 2008	Bargaining
21 November 2008	Bargaining
25 November 2008	Bargaining
26 November 2008	Bargaining

9 December 2008	Bargaining
10 December 2008	Bargaining
15 December 2008	Mediation
17 December 2008	Bargaining
28 January 2009	Bargaining
29 January 2009	Bargaining
19 March 2009	Mediation
23 March 2009	Mediation
24 March 2009	Mediation
26 March 2009	Mediation
27 March 2009	Mediation
31 March 2009	Mediation
3 April 2009	Mediation
6 April 2009	Mediation
8 April 2009	Mediation
14 April 2009	Mediation
20 April 2009	Mediation – annual leave issue
23 April 2009	Mediation – airside access issue
24 April 2009	Mediation
28 April 2009	Mediation
30 April 2009	Mediation
4 May 2009	ERA – annual leave issue
13 May 2009	Mediation
22 May 2009	Mediation
27 May 2009	Mediation
28 May 2009	Mediation
4 June 2009	Mediation

[17] On 15 December 2008 the parties attended mediation for the first time with Department of Labour mediator Janet Scott.

[18] On 19, 23 and 24 March 2009 the parties attended a second mediation with private mediator Keith Handley. Little progress was made during this mediation and the Union served a strike notice for a full withdrawal of labour on the last day of this mediation.

[19] On 26, 27, 31 March, and 3, 6 and 8 April 2009 the parties attended a third mediation with Department of Labour mediator Judith Scott. Little progress was made.

[20] On 14 April 2009 the parties resumed mediation with mediator Janet Scott. Considerable progress was made on this day in terms of reducing the number of

claims on the table, however the gap between the parties' positions on the monetary claims remained significant.

[21] The parties attended mediation relating to Zeal's decision to cancel employees' provisional leave due to the Union's strike action on 20 April 2009. The matter was not resolved at mediation and the parties attended an investigation meeting of the Employment Relations Authority on 4 May 2009.

[22] On 23 April 2009 the parties attended a further mediation relating to the granting of "airside" access to union officials. There was an interim agreement reached by the parties' lawyers following this mediation, on 27 April 2009.

[23] On 24, 28, 30 April and 13 and 22 May 2009 the parties attended further mediation with mediator Janet Scott relating to the negotiations.

[24] There have been informal discussions between Mr Rob Fyfe Chief Executive of Air NZ, Mr Bruce Parton Group General Manager - Short Haul Airlines of Air NZ, Mr Sowry and Mr Little and Mr Crang.

[25] The parties have been unable to make any real progress in reaching agreement in relation to the unsettled claims, and in particular the pay claims.

[26] On 30 April 2009 the Union submitted its counterclaims. By letter dated 5 May 2009 Zeal wrote to the Union in response. The parties have been unable to conclude a collective employment agreement.

[27] As well as the negotiations, the parties have also been involved in proceedings in the Employment Relations Authority concerning allegations and counter allegations of breach of good faith arising out of the negotiations.

Strike Notices and Strike Action

[28] The Union issued its first strike notice on 9 March 2009. The strike notice was for an indefinite time and involved:

- A reduction of the normal performance of cabin crew;
- B failure to wear the Air NZ hats and footwear;
- C wearing of hairstyles, cosmetics, and accessories, such as badges that did not conform with uniform requirements;
- D distribution of leaflets to passengers;
- E refusal to complete three forms of documentation, namely; sector reports, bar closure reports and performance appraisals.

The strike notice was withdrawn the same day.

[29] A second strike notice was issued on 11 March 2009. This notice removed the reference in the earlier strike notice of distributing pamphlets to passengers but still contained the reduction in uniform requirements and refusal to complete three forms of documentation, as outlined in the first strike notice. It was for an indefinite period. This notice was withdrawn on 13 March 2009.

[30] A third strike notice was issued on 13 March 2009 for an indefinite period. This was the same as the first strike notice and reduced the normal performance of cabin crew as originally stated, with the exception of distributing leaflets to passengers due to an agreement that was reached between the parties on 26 March 2009. The Union's members continued to comply with that strike notice from 26 March 2009.

[31] A fourth strike notice was issued on 17 March 2009 advising that in addition to the third strike notice, "*Employees will not make themselves available for standby duty. This ban on standby duty will apply whether the employee is at home; away from home base; or at an airport or aerodrome or elsewhere at the time they would otherwise be required to perform standby duty. This strike action will commence at 0001 hours on Wednesday 18 April 2009 and will continue indefinitely.*"

[32] A fifth strike notice was issued on 24 March 2009 advising a full withdrawal of labour for the period 0001 8 April 2009 to 2359 11 April 2009. This was withdrawn on 2 April 2009.

[33] A sixth strike notice was issued on 21 April 2009 advising a full withdrawal of labour for the period 0001, 7 May 2009 to midnight, 10 May 2009 and the strike proceeded as notified.

[34] On 21 April 2009 Zeal issued a lock out notice covering a complete and continuous discontinuation of employment, including (without limitation) the requirement to perform any duties and the payment of any remuneration covering the period of 0100 hours 7 May 2009 to midnight 10 May 2009. The lock out proceeded as notified.

[35] On or about 23 June 2009 the Union gave notice of and duly discontinued its previously notified strike action. There have been approximately 91 days of industrial action during the parties' negotiations.

The merits

[36] The Act requires that collective bargaining is to lead to collective agreements in the absence of a genuine reason, based on reasonable grounds, that it should not. That being the objective, parties to collective bargaining experiencing serious difficulties may seek this Authority's assistance to resolve the difficulties. That assistance is facilitation. Because it is preferable and desirable that the parties themselves conclude the agreement between them, the Authority's intervention is not lightly undertaken. It is only where the situation between the parties satisfies prescribed statutory criteria, is the Authority's involvement appropriate. I agree with the Authority's statement in *NZALPA & Air Nelson Ltd*¹, that there is no discretion to refuse facilitation if the statutory criteria are satisfied.

[37] Zeal believes that the provision of facilitation will assist the parties to reach a resolution. It further believes that in the absence of facilitation assistance, it is unlikely that agreement will be reached.

¹ unreported AA222/08, 30 June 2008, D King at para [6].

[38] The Union resists the application. It says that the parties continue to bargain and make progress. It says that intervention by the Authority is not warranted and that it is preferable that the parties conclude their bargaining themselves unassisted.

[39] Mr Little says that Zeal is obsessed with facilitation and thereby effectively avoiding responsibility for its position. He says he came to a realisation that Zeal is using this present application and its desire for facilitation as a device to avoid dealing with the Union. For these reasons, it remains his view the request for facilitation should be opposed.

[40] Mr Little is optimistic and gives this evidence to the Authority:-

12. The reality is we are not that far apart. It will still take an effort to close the gap. It was always going to. I have said to Rob Fyfe that I believe that a good, full day of bargaining should be enough to secure an agreement with another full day to write up the terms of settlement. There is still a big job of work to do to stock-take what has been agreed over the last several months. There does not need to be any more delay with this.

[41] I find that one serious difficulty between the parties, is the Tour of Duty (TOD) allowance claim although there has been significant progress in terms of reducing the gap between the parties. I find that the Union's last communicated position on the matter was that it was "immovable". I find Zeal's last communicated position was that Mr Sowry had "exhausted his mandate". The other outstanding claims fall in behind this one. But some of them are very contentious claims too.

[42] I turn now to address the statutory criteria. The application is made on the grounds set out at sections 50C(1)(b) and 50C(1)(c) of the Act as follows:-

50C. Grounds on which Authority may accept reference

(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

...

(b) that—

(i) the bargaining has been unduly protracted; and

(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

(c) that—

- (i) in the course of the bargaining there has been 1 or more strikes or lockouts; and*
(ii) the strikes or lockouts have been protracted or acrimonious:

[43] I am satisfied that in the course of the bargaining between these parties, there have been 1 or more strikes and lockouts. There was a lock out from 7 May 2009 to 10 May 2009. There have been two strikes. Firstly a complete withdrawal of labour and secondly, continuing partial strike action which ended only days ago according to evidence given to the Authority at the investigation meeting. This continuing partial strike action has continued for about 91 days.

[44] The qualifiers of protraction and acrimony are in the alternative. One is enough.

[45] Mere “protraction” without more is sufficient and there is no qualification that the protraction must be “undue”. I therefore accept that what is required is mere protraction and I further accept that protracted means “prolonged” or “continued”. On any objective assessment, I am satisfied that 91 or so days of strike action amounts to strikes that have been prolonged and continued so as to be protracted for the purposes of section 50C(1)(c)(ii) of the Act.

[46] This conclusion is sufficient to determine the application. I consider it unnecessary and undesirable, if not unhelpful, to proceed to chronicle and scrutinise the historical interactions between the parties in terms of analysing whether there has been “acrimony”. I also consider this determination is lengthy enough as it is and nor do I wish to delay these parties any further on their journey towards resolution. For completeness however, I state that it is also my view that the criteria specified under section 50C(1)(b) of Act in terms of “unduly protracted bargaining” and “extensive efforts” have been met as would also permit a reference to facilitation under that provision.

The determination

[47] Despite the Union’s commendable optimism, it is clear to me these parties continue to experience serious difficulty in concluding a collective employment agreement. Even with the assistance of very experienced professional mediators, they

have been unable to conclude a collective agreement. The parties have spent more days with a mediator than they have in constructive negotiations.

[48] Having regard to the history of these parties' extensive interactions, and with respect to the Union, my own objective assessment is that the stated optimism is unrealistic. If I detect it correctly, the Union's suspects that Zeal seeks to avoid engaging with it. A reference to facilitation will require both Zeal's and the Union's commitment to engagement.

[49] For all the foregoing reasons, I determine that the parties are deserving of the Authority's intervention to assist them towards agreement. **I therefore grant the application under section 50C(1)(c) of the *Employment Relations Act 2000* and refer these parties and all matters relating to their bargaining for a collective agreement, to facilitation. The parties must commit themselves to that process in good faith.**

[50] The matter is referred to the Chief of the Authority for the necessary arrangements to be made.

Leon Robinson
Member of Employment Relations Authority